

**A PRIMER ON FLORIDA FORECLOSURE LAW, INCLUDING FLORIDA'S SHOW
CAUSE FORECLOSURE STATUTE, A CHECKLIST OF THE STEPS INVOLVED IN A
FLORIDA MORTGAGE FORECLOSURE & A BRIEF DISCUSSION OF DEEDS IN
LIEU OF FORECLOSURE IN FLORIDA**

by

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Unlike approximately 35 other states, Florida does not have any form of non-judicial mortgage foreclosure. All mortgage foreclosures in Florida must be filed and prosecuted as civil law suits, usually in Florida's Circuit Courts, which are the state trial courts with general jurisdiction in disputes where the amount in controversy exceeds \$15,000.00. In general, a mortgage foreclosure suit is treated no differently than any other type of civil suit, and is subject to the same rules governing discovery, including depositions, motion practice, affirmative defenses, counterclaims, trial, and rights of appeal as any other civil action. A hotly contested mortgage foreclosure in Florida can conceivably take more than a year to resolve, not including any subsequent appeal.

The plaintiff in a Florida mortgage foreclosure is the owner and holder of the mortgage and the underlying promissory note or other debt obligation secured by the mortgage. The defendants to the foreclosure suit must include the owner(s) of the property, and usually also include the borrower(s), if different from the owner(s), any guarantors, all junior lienholders, and those tenants whose leasehold or possessory interests arose after the mortgage and whose leasehold or possessory interests the plaintiff wishes to eliminate.

The identities of the parties-defendant to the suit are usually determined by a title search, typically called a foreclosure title commitment, obtained from a title insurance agency. The commitment identifies all of the parties to be named as defendants in the foreclosure suit. If the identified defendants are named and served, and the foreclosure is prosecuted to judgment in accordance with Florida law, the title insurance company providing the commitment will then issue a title policy to the plaintiff if the plaintiff is the winning bidder at the foreclosure sale. (As is discussed later, the plaintiff is almost always the high bidder in a commercial foreclosure in Florida.)

The determination of the priorities of the various ownership, lien and leasehold or possessory interests is somewhat complicated, and beyond the scope of this short primer. However, in general, with a few exceptions, the following rules apply:

- (1) An open possessory interest, such as a tenant interest, arising prior to the recording of a mortgage, regardless of whether the interest is recorded, primes the mortgage. (An interest "primes" a mortgage under Florida law when the priority of the mortgage is deemed inferior and subject to the interest.)
- (2) Recorded interests, whether possessory or not, take priority based on their respective recording dates. Thus, a mortgage's priority vis-à-vis other liens is generally determined not by the date of the mortgage, but by the date of recording of the mortgage in the public records of the county in which the mortgaged property is physically located.
- (3) Except as to possessory interests, and those pre-existing interests as to which the mortgagee has actual knowledge, recorded interests generally take priority over unrecorded interests.

Once the suit is filed, it is prosecuted to judgment in the normal fashion of any other Florida law suit. That is, the judgment is obtained either after a trial, or after a hearing on a motion for summary or default judgment. The one exception to this, which is discussed in more detail ahead, is that Section 702.10, Florida Statutes (2010) provides a somewhat streamlined mortgage foreclosure procedure employing orders to show cause. This procedure, if successful, results in a final judgment of foreclosure being entered much more rapidly than is customary in a typical Florida civil suit.

Once the suit is prosecuted to conclusion, either by trial, motion for default or summary judgment, or through the use of the show cause procedure under Section 702.10, the final judgment of foreclosure is entered.

The foreclosure judgment does several things. A typical foreclosure judgment: (a) determines plaintiff's entitlement to be paid on the underlying indebtedness, (b) determines the amount of that indebtedness, including principal, interest, costs, attorneys' fees, prepayment penalties, late fees, premiums, taxes, etc., (c) forecloses the interests of the owner(s), borrower(s), all junior lienholders, and those tenants who have been properly named as defendants, (d) sets the foreclosure sale date, (e) directs the Clerk of the Court on the distribution of any excess sale proceeds, (f) may provide the Clerk with specific sale conduct instructions not already provided by Florida's judicial sale statute, Section 45.031, Florida Statutes (2010), (g) may set a redemption deadline, and (h) reserves jurisdiction to award appropriate future relief, such as writs of possession and deficiency judgments.

In cases involving foreclosures of mortgages encumbering multiple parcels, the foreclosure judgment may also provide for whether all of the parcels should be sold as one

combined parcel, or whether the parcels should be sold separately. Florida law allows for either scenario depending on the equitable factors present in a particular case.¹

Although it is filtered through the process of a full-fledged law suit, the actual foreclosure procedure itself is relatively simple in Florida. The following table shows the fundamental steps in a Florida mortgage foreclosure.

<u>STEPS IN A FLORIDA MORTGAGE FORECLOSURE</u>	<u>COMMENTS</u>
Foreclosure Complaint filed. Plaintiff is owner and holder of mortgage. Defendants MUST include owner of subject real property, and should include all junior lienholders. Typically, claims for money judgment against all note makers and guarantors are included. Tenants whose interests arose after the date of the recording of the mortgage may be named as defendants and foreclosed.	Form 1.944 of the Florida Rules of Civil Procedure contains a bare-bones form for the foreclosure complaint.
A final judgment of foreclosure is entered, either after a show cause hearing under §702.10, FLA. STAT., or after a summary judgment hearing, or after a trial. The final judgment determines the amount owed to the plaintiff on the debt secured by the mortgage, and schedules a foreclosure sale for the mortgaged property. The foreclosure sale is usually scheduled for roughly 30 days after the date of entry of the judgment.	The final judgment of foreclosure determines the amount owed to the plaintiff on the indebtedness secured by the mortgage, including principal, interest, late charges, interest, attorneys' fees, costs and other charges. The entire aggregate amount stated in the judgment accrues post-judgment simple interest at a rate determined by the Florida Comptroller on January 1 of each year. The rate for 2010 is 6%.
The final judgment of foreclosure usually provides that the foreclosure sale will be conducted pursuant to §45.031, FLA. STAT. That statute requires that the foreclosure sale be advertised once a week for two consecutive weeks in a newspaper or periodical of general circulation in the county in which the property is located, with the last publication occurring at least 5 days before the scheduled sale.	§45.031 provides a mechanism for the advertising and conduct of judicial sales of all types, including foreclosure sales. While the statute is not the only foreclosure sale mechanism available in Florida, it is used almost 100% of the time for mortgage foreclosures because Florida's title insurance industry recognizes the validity and insurability of sales conducted pursuant to the statute. In addition, the statute is very utilitarian in that it provides specific

¹ The author was once involved in a judicial sale in which the final judgment provided that two sales, Sale A and Sale B, be conducted serially. Sale A was a sale of multiple parcels as a single unit. Sale B was a sale of the same parcels as separate units. The Sale which generated the largest total bid was deemed the operative sale, with the other sale being declared automatically void.

	requirements for advertising the sales, a short ten (10) day window after the foreclosure sale for objections to the sale, and an automatic confirmation of a sale if no timely objections have been filed.
Pursuant to §45.031, most foreclosure sales are conducted by the Clerk of the Court in the county in which the property is located. Most sales are held at 11:00 a.m. The plaintiff is allowed to bid on credit up to the full amount of the judgment, plus accrued post-judgment interest. All other bidders must pay cash for their bids if they are the winning bidder. Anyone attending the sale is permitted to bid, including the owner.	§45.031 provides that the winning bidder must deposit 5% of the winning bid immediately upon closing of the bidding. Most Clerks require by local administrative order that the remaining 95% of the bid amount be paid in cash or cashier's check later that same day, usually at either 2:00 p.m. or 4:00 p.m. depending on the county involved.
The Clerk of the Court collects a non-refundable registry fee for receiving funds, including sums paid to the Clerk by a successful third party bidder at a foreclosure sale. The registry fee is currently 3% of the first \$500 received, and 1.5% of every additional \$100.00 received. §28.24(10), FLA. STAT. (2010).	
All bidders, including the plaintiff, must pay a Florida documentary stamp tax prior to issuance of the Certificate of Title, which tax is assessed at the rate of \$0.70 per \$100, or any portion thereof, bid. Thus, on a bid of \$100, the tax is \$0.70. On a bid of \$101, the tax is \$1.40. Miami-Dade County charges an additional fee.	The requirement that a non-plaintiff bidder pay the entire winning bid amount on the same day as the sale, coupled with the requirement of the registry fee and the documentary stamp tax, results in most foreclosure sales of commercial property in Florida ending with the plaintiff as the high bidder with a token bid of \$100. Because Florida is a judicial foreclosure state, there is absolutely no <i>Durrett</i> risk to a foreclosing lender bidding \$100, or even less, at a foreclosure sale. Only when there are competing third party bidders do most plaintiffs bid more than \$100.
§45.031 provides that upon completion of the foreclosure sale, the Clerk is to issue a Certificate of Sale, identifying the winning bidder at the sale.	The Certificate of Sale is usually issued by the Clerk within an hour or so of the sale's completion. But with the current glut of foreclosures being experienced by many Clerks' offices, there have been substantial delays, weeks in some instances but more often several days, in the issuance of the Certificates of Sale.
§45.0315, Florida's redemption statute, provides that all rights of redemption are	Florida law does not provide a debtor with a non-contractual right to cure a default.

<p>extinguished automatically upon issuance of the Certificate of Sale pursuant to §45.031, unless the court has specified another later redemption deadline.</p>	<p>However, the debtor, any guarantor, any junior lienholder, and any tenant, has an absolute right to redeem the property by paying to the plaintiff the full judgment amount, together with interest, and thereby becoming subrogated to the plaintiff's rights under the mortgage.</p>
<p>§45.031 provides that anyone objecting to the sale has ten (10) days from the filing of the Certificate of Sale to do so.</p>	<p>Sale objections are quite rare in Florida. Objections to the size of the winning bid are almost never successful, especially if the plaintiff is present at the sale. Typical objections relate to fraud in the bidding, collusion, or improper conduct of the sale itself by the Clerk. The delays in some counties in the issuance of Certificates of Sale results in the deadline for objections being <i>de facto</i> extended.</p>
<p>In the event of an objection to the sale, §45.031 provides that the objection should be heard promptly by the judge.</p>	<p>No title issues from the foreclosure sale until and unless all timely objections have been resolved. If an objection is granted, the foreclosure sale is typically readvertised and occurs again roughly 30 days later.</p>
<p>If no timely objection to the sale has been made, and all bid amounts, registry fees, and documentary stamp taxes have been paid, then on or about the eleventh day after the foreclosure sale the Clerk of Court issues a Certificate of Title to the highest bidder at the foreclosure sale.</p>	<p>The Certificate of Title is the functional equivalent of a quitclaim deed. Pursuant to §45.031, the foreclosure sale is automatically confirmed upon the issuance of the Certificate of Title. No further confirmation proceeding is contemplated or necessary. Title to the property does not pass to the winning bidder until issuance of the Certificate of Title.</p>
<p>A deficiency judgment is typically not sought until after completion of the foreclosure sale process. The deficiency proceeding is typically commenced by filing a motion for deficiency judgment in the existing foreclosure action, and scheduling it for hearing. The deficiency hearing is typically evidentiary in nature.</p>	<p>The deficiency is determined by subtracting from the full judgment amount, with accrued interest, the greater of the following two numbers: (a) the amount bid at the foreclosure sale, or (b) the fair market value of the property on the date of the foreclosure sale. The determination of fair market value is made by the court after consideration of all evidence presented to it on that issue. Deficiency hearings often include testimony from the borrower and from various expert appraisers and real estate brokers on the fair market value of the property on the date of the foreclosure sale. The winning bidder, as the new owner of the property, is entitled to testify as to his / her opinion as to the value of the property.</p>
<p>If a deficiency judgment is awarded, the court</p>	

usually enters it shortly after the deficiency hearing.	
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In 1993, in an effort to streamline the foreclosure process, Florida enacted Section 702.10, which created a statutory foreclosure procedure utilizing orders to show cause. The author was actively involved in the drafting of Section 702.10(1), and testified before passage of the legislation before the Governor's Mortgage Foreclosure Study Commission. The statute authorizes two separate and distinct show cause proceedings.

(A.) The Order to Show Cause Why Judgment Should Not be Entered.

The first show cause proceeding is the Order to Show Cause Why Judgment Should Not Be Entered.

Section 702.10(1) provides a show cause mechanism which can be used in either commercial or residential mortgage foreclosures. In its simplest form, the statute provides as follows:

1. A verified complaint for foreclosure is filed.

The Florida Supreme Court has promulgated Form 1.944 of the Florida Rules of Civil Procedure for use as a Complaint in a foreclosure action. Form 1.996 has been promulgated for use as a Final Judgment in a foreclosure action.

2. Upon the filing of the verified complaint, the court will issue an order to show cause why a foreclosure judgment should not be entered.

3. In general, the show cause order schedules a hearing at which the defendant mortgagor² is required to appear before the court and show cause why a final judgment of foreclosure should not be entered on that date.

4. If the mortgagor fails to appear at the hearing, or does appear at the hearing but fails to show cause, then a final judgment of foreclosure shall be entered forthwith at that show cause hearing.

5. The statute provides that the order to show cause must be served on the mortgagor at least twenty (20) days before the show cause hearing. This provision results in the show cause hearing usually being scheduled at least 30 to 45 days after the entry of the order to show cause in order to allow sufficient time to effect service of process on all of the defendants prior to the show cause hearing.

6. The statute further provides that the raising of "defenses by motion" will constitute a showing of good cause, but that in such an event, the show cause hearing will be used to hear the motion to dismiss. It is not absolutely clear under the statute if any garden-variety motion to dismiss is sufficient to prevent the entry of final judgment, or if the motion actually has to raise valid defenses. However, the Florida 4th DCA's decision in *Muss v. Lennar*

² The statute talks in terms of "mortgagor", not referencing junior lienholders and other defendants, leading some to believe that the statute has application only in that rare case with no defendants other than the mortgagor. However, the author has routinely used the show cause procedure in a variety of foreclosures with multiple defendants in a variety of jurisdictions around the state. Those few judges who have questioned the applicability of the statute to multiple-defendant foreclosures have seemed persuaded by the argument that due process is being fully served by giving all defendants notice of the show cause hearing and an opportunity to be heard. The author has never encountered a problem with insuring title obtained through a show cause foreclosure, regardless of the number of defendants involved in the action.

Further, the statute was enacted as a direct result of, and in compliance with, the findings of the Final Report of The Foreclosure Study Commission dated January 1992. The Commission was created by the Florida Legislature, had thirteen members from a variety of professions, met eight times at various places in Florida, took testimony from a variety of persons throughout Florida, including the author, and was created expressly to review the foreclosure system, identify problems therein, and recommend alternatives to the then-existing foreclosure system to make it operate more efficiently. It is hard to believe that the legislation, including Section 702.10(1), directly resulting from, and based on the findings of, that endeavor was intended to apply only to those rare foreclosures where there are no defendants other than the borrower.

Fla. Partners I, L.P., 673 So. 2d 84 (Fla. 4th DCA 1996) suggests that a garden-variety motion to dismiss will suffice to prevent entry of a final judgment of foreclosure at the show cause hearing.

7. The statute also provides that the filing of a verified or sworn answer will constitute a showing of good cause. In *Muss v. Lennar Fla. Partners I, L.P.*, 673 So. 2d 84 (Fla. 4th DCA 1996), the Court held that a defendant's verified answer, which was sworn to be "true to the best of his knowledge and belief" would not prevent the entry of a final judgment under Section 702.10(1). This case points out the importance of making sure that the verification portions of the Answer, as well as those of the Complaint, not be made upon information and belief or upon knowledge and belief. This same case interpreted the portion of Section 702.10(1) concerning the filing of defenses by motion to refer only to motions attacking matters appearing on the face of the Complaint, as opposed to the types of affirmative defenses which could presumably be raised by an Answer.³

8. The statute also provides that the defendant may attempt to show good cause by filing an affidavit, by appearing in person, or by appearing through counsel. In any of these latter three events though, the showing of good cause is not automatic, and a hearing, usually evidentiary, must be conducted.

9. **The show cause statute also contains an attorneys' fee provision which allows, in the event of a default by the defendant, a recovery of attorneys' fees of not more than 3% of the principal balance of the mortgage note owing as of the time of the filing of the suit,**

³ Note here that the 2010 amendment to Rule 1.110(b) of the Florida Rules of Civil Procedure provides that when filing an action to foreclose a mortgage on residential property, the complaint must be verified. However, the Rule goes on to provide that, "When verification of a document is required, the document filed shall include an oath, affirmation, or the following statement: 'Under penalty of perjury, I declare that I have read the foregoing, and the facts alleged therein are true and correct to the best of my knowledge and belief.'" This rule amendment could be read to modify the holding in *Muss v. Lennar*, at least insofar as residential mortgage foreclosures are concerned.

without the necessity of filing supporting affidavits or having an attorneys' fee hearing.

Thus, on a \$2,000,000.00 principal note balance for example, an attorney's fee of up to \$60,000.00 would be allowed without the necessity of supporting affidavits or a hearing. That amount is deemed reasonable per the statute.

This provision dovetails with Section 702.065(2), Florida Statutes (2010), which provides that in a mortgage foreclosure proceeding, when a default judgment has been entered against the mortgagor and the note or mortgage provides for the award of reasonable attorney's fees, it is not necessary for the court to hold a hearing or adjudge the requested attorney's fees to be reasonable if the fees do not exceed 3 percent of the principal amount owed at the time of filing the complaint, even if the note or mortgage does not specify the percentage of the original amount that would be paid as liquidated damages. Such fees constitute liquidated damages in any proceeding to enforce the note or mortgage.

(B.) The Order to Show Cause Why Payment Should Not Be Made.

Section 702.10(2) provides an entirely separate show cause mechanism which applies only in non-residential foreclosures. Although the statute does not define the term “non-residential”, the legislative history of the statute makes it reasonably clear that the legislature intended that this second show cause procedure not apply to homestead property, or to single-family residences actually occupied by the mortgagor. However, this second show cause mechanism might be used in connection with multi-family residential units which are held by mortgagors as investment properties. Section 702.10(2) provides that upon the filing of a verified complaint, and upon appropriate motion, the Court will issue, *ex parte*, an order to show

cause why payment should not be made. Said order to show cause must be served upon the mortgagor in the same fashion and within the same time frame as provided for service of orders to show cause under Section 702.10(1). At the show cause hearing, if the Court finds that there is a reasonable probability that plaintiff will prevail in the foreclosure action, it will enter a payment order. A payment order is a prejudgment order requiring the mortgagor to make payments to the plaintiff on a regular basis during the pendency of the foreclosure action, which sums are to be equal to the regular pre-default mortgage payments, or to vacate the premises should the payments not be timely made. The statute also provides that the Court can impose alternate sanctions in the event vacation of the premises would not be an affective enforcement mechanism. Section 702.10(2) is sometimes referred to as the “pay to play statute”. The purpose of the statute is to require a defendant who intends to delay a foreclosure by contesting it to pay for the privilege of doing so. The amount to be paid is arbitrarily pegged by the statute to the pre-default mortgage payments in the particular case.

The Florida Supreme Court, in *Caple v. Tuttle’s Design-Build, Inc.*, 753 So. 2d 49 (Fla. 2000), reversed the Third District’s decision in *Tuttle’s Design-Build, Inc. v. Caple*, 712 So. 2d 1213 (Fla. 3d DCA 1998), in which the Third District had held unconstitutional Section 702.10(2), Florida Statutes (1998). The Third District had found that this provision in essence imposed a mandatory injunction on the mortgagor, in violation of Rule 1.610 of the Florida Rules of Civil Procedure, which requires that no temporary injunction be entered unless a bond in an appropriate amount is given by the movant. The Third District found that the lack of a bond requirement made the statute unconstitutional because it failed to afford due process protection to the defendant, and because it infringed upon the procedural rules governing injunctions promulgated in the Florida Rules of Civil Procedure. However, the Florida Supreme

Court disagreed, finding that the statute created substantive rights, that any procedural provisions were directly related to the definition of the substantive rights, and that the statute adequately provided for due process through its notice and hearing provisions, and its provision allowing the mortgagor to post a bond to stay the payment order.

When the “pay to play statute” is coupled with the assignment of rents statute, Section 697.07, Florida Statutes (2010), the results can be devastating on the mortgagor. If the plaintiff can successfully argue to the trial court that it has a perfected rent assignment, then the mortgagor can be put in the position of having to make payments under the "pay to play statute," but being unable to use rents generated from the property to make those payments since the mortgagee has a lien on those rents already.

In general, the use of the show cause procedures under Section 702.10 brings many foreclosures to an early conclusion, either through entry of a final judgment of foreclosure, or through the filing of an early bankruptcy by the borrower.

In most cases, the use of the show cause foreclosure procedures significantly shortens the time to complete a Florida foreclosure, with many show cause foreclosures resulting in the issuance of title within 90 to 120 days after the filing of the suit. This timeframe is often markedly shorter than that extant in a regular foreclosure suit. The following timeline comparison is helpful in understanding why the show cause foreclosure procedures are usually faster than the usual civil foreclosure suit counterpart.

SHOW CAUSE FORECLOSURE TIMELINE COMPARISON

SHOW CAUSE FORECLOSURE IN FLORIDA UNDER §702.10	TIME / # OF DAYS FROM FILING SUIT	REGULAR JUDICIAL FORECLOSURE IN FLORIDA	TIME / # OF DAYS FROM FILING SUIT
Filing suit papers	-0-	Filing suit papers	-0-
Obtaining Orders to Show	1-2		

Cause			
Service of Process	5-10	Service of Process	5-10
Deadline for defendants to respond to suit papers – 20 days after service of process. Motion to dismiss or Answer are most common responses.	25-30	Deadline for defendants to respond to suit papers – 20 days after service of process. Motion to dismiss or answer are most common responses.	25-30
Show cause hearing, automatically including hearing on any motions to dismiss filed in response to suit.	30-45	Hearing on any motion to dismiss filed is usually set 20-30 days after motion filed.	45-60
Final Judgment entered if plaintiff prevails at show cause hearing. Final Judgment schedules foreclosure sale.	30-50		
Foreclosure sale held after prevailing at show cause hearing. Rights of redemption extinguished unless another deadline specified by court order.	80-110		
Certificate of Title issued on 11th day after foreclosure sale if no objections to sale filed. Sale is automatically confirmed by operation of Section 45.031, Florida's judicial sale statute, if no objections filed within ten (10) days after foreclosure sale.	90-120		
Answer filed by Defendants if final judgment not granted and motion to dismiss denied at show cause hearing. Case now at issue and ready to be set for trial. Discovery begins in earnest.	40-65	Answer filed by Defendants if motion to dismiss denied. Case now at issue and ready to be set for trial. Discovery begins in earnest.	55-80
Hearing on motion for	Approximately 90	Hearing on motion for	Approximately

summary judgment. (Florida Rules provide for at least 20 days notice of hearing for summary judgment.)		summary judgment. (Florida Rules provide for at least 20 days notice of hearing for summary judgment.)	105
Final summary judgment entered if plaintiff prevails at summary judgment hearing.	Approximately 90	Final summary judgment entered if plaintiff prevails at summary judgment hearing.	Approximately 105

Foreclosure sale held if summary judgment granted. Rights of redemption terminated unless another deadline specified by court order. Sale is automatically confirmed by operation of Section 45.031, Florida's judicial sale statute, if no objections filed within ten (10) days after foreclosure sale.	Approximately 120	Foreclosure sale held if summary judgment granted. Rights of redemption terminated unless another deadline specified by court order. Sale is automatically confirmed by operation of Section 45.031, Florida's judicial sale statute, if no objections filed within ten (10) days after foreclosure sale.	Approximately 135
Certificate of Title issued.	Approximately 131	Certificate of Title issued.	Approximately 146
Discovery if summary judgment not granted.	120-240	Discovery if summary judgment not granted.	135-255
Trial set.	300+	Trial set.	315+
Final judgment after trial.	305+	Final judgment after trial.	320+
Foreclosure sale held pursuant to final judgment after trial. Rights of redemption terminated unless another deadline specified by court order. Sale is automatically confirmed by operation of Section 45.031, Florida's judicial sale statute, if no objections filed within ten (10) days after foreclosure sale.	335+	Foreclosure sale held pursuant to final judgment after trial. Rights of redemption terminated unless another deadline specified by court order. Sale is automatically confirmed by operation of Section 45.031, Florida's judicial sale statute, if no objections filed within ten (10) days after foreclosure sale.	350+
Certificate of Title issued	346+	Certificate of Title issued.	361+
Filing of notice of appeal.	376+	Filing of notice of appeal.	391+
Resolution of any appeal	1 year from filing notice of appeal.	Resolution of any appeal.	1 year from filing notice of appeal.

The author has exclusively used the show cause foreclosure procedures since their enactment in 1993. Surprisingly few show cause hearings with actual argument or presentation

of evidence occur. Instead, the most common outcome is an early bankruptcy filing by the debtor(s), a negotiated settlement, or the entry of a final judgment of foreclosure with either no appearance or a token appearance by defendants and / or their counsel. By far the most common outcome is the entry of a final judgment of foreclosure.

Assuming the show cause foreclosure process does not result in the early entry of a final judgment, the general steps to be considered in prosecuting a foreclosure suit include the following. **This is NOT an all-inclusive list, and the reader is strongly encouraged to review all applicable case law, statutory provisions, and applicable rules before relying at all on this list:**

1. Complaint
a. Alleges execution and delivery of note and mortgage (copies to be attached to complaint).
b. Alleges present ownership of note and mortgage in plaintiff.
c. Parties must be properly named/corporate searches on all parties.
i. Defendant(s) must include present fee simple owner(s) of the real property, with legal and equitable title; all junior lienors; and as to any known defendants without known addresses/residences or unknown defendants, any unknown claimants under them. Join the unknown parties under a known party by using the language at Sec. 49.021, F.S., as well as the language under Sec. 49.08(1), F.S.
ii. Plaintiff or defendant must include any collateral assignee.
iii. Defendant/owner named as being the party in possession and join other parties in possession.
iv. A mortgage signed by a single person can be foreclosed against such person alone without joinder of a subsequent spouse.
v. A mortgage signed by a married person alone owning the real property alone or with a spouse must be foreclosed with joinder of the spouse and allegations of non-homestead and/or spousal consent made. See <i>Pitts v. Pastore</i> , 561 So. 2d 297 (Fla. 2d DCA 1989).

vi.	Interest of the State of Florida (Sec. 69.041, F.S.) and the federal government (28 U.S.C. 2410[b]) must be listed specifically. As to other interests, it is sufficient to state that such interests are subordinate and inferior to the mortgage being foreclosed.
vii.	Corporations
1.	If dissolved prior to July 1, 1990, name the last Board of Directors as Trustees of the dissolved corporation.
2.	If dissolved on or after July 1, 1990, name the dissolved corporation directly and serve as if corporation is still active.
viii.	Partnerships
1.	A limited partnership may be joined in its own name. Serve any general partner.
2.	Join the partnership in its own name if title is in the partnership name. Serve any general partner.
d.	All parties including subordinate interests must be joined. The following is a nonexclusive list of subordinate interests which may be encountered;
i.	Mortgage
ii.	Judgments
1.	A judgment must be certified prior to the recordation of the lis pendens to constitute a lien on real property.
2.	If judgment is against one spouse, may assume mortgagors/owners are married unless a divorce decree appears before the filing of the lis pendens.

3. Effective October 1, 1993, affixing of creditor's address to the judgment is a prerequisite to perfecting the lien on real property. Sec. 55.10, F.S.

iii. Federal Tax Liens

1. A federal tax lien against one spouse does not attach to entireties property. But see *United States v. Craft*, 535 U.S. 274, 122 S. Ct. 1414, 152 L.Ed.2d 437 (2002), holding that a husband's interest in entireties property was "property" or "property rights" which could be reached by a federal tax lien against him alone, even though there was no joint tax lien against the wife. The Supreme Court purports to limit the holding the federal tax liens alone. However, the analysis used by the Court in support of its decision could equally well be used by a judgment creditor of one spouse seeking to reach entireties property. In *Hatchett v. United States*, 330 F.3d 875 (6th Cir. 2003), the Sixth Circuit applied *United States v. Craft* retroactively and subjected entireties property to a federal tax lien against the husband.

2. A federal tax lien attaches to homestead property.

iv. Other United States liens.

1. If acquired by the United States after the filing of the lis pendens and before the certificate of sale, they may not be eliminated by a previously filed lis pendens.
2. Civil judgments in favor of the U.S. and against the purchaser/borrower have priority over a purchase money mortgage.

v. Construction Liens under Ch. 713, F.S. On actions commenced on and after January 1, 1981, a lienor must be made a party to the foreclosure suit if its lien is filed pursuant to a notice of commencement recorded within one year or other period as specified on the notice of commencement prior to the lis pendens.

vi. Condominium liens. After April 1, 1992, condominium assessments are wiped out as to first mortgage of record in excess of six months or 1% of the loan, whichever is less. The exemption does not carry to subsequent 3rd party purchasers. See Sec. 718.116(1)(a), F.S., effective April 1, 1992. As of 2010, the 6 months was extended to 1 year.

Homeowners Association liens. Pursuant to Section 720.3085, Florida Statutes (2010), a first mortgagee's liability for such liens is limited to the lesser of one year of regular or special assessments, or 1% of the mortgage debt, but the Homeowner's Association must be joined as a party-defendant.

vii. Code Enforcement Board liens under Ch. 162, F.S. Such liens may relate back to before the recording of the lis pendens.

viii. Others: There may be other special statutory liens which may be encountered by the title examiner.

e. Must contain a good legal description.

f. Must allege default.

g. Contains statement of amount remaining due.

h. Effective October 1, 1993, a motion to show cause why a final judgment should not be filed expedites proceedings. See Sec. 702.10, F.S.

2.	Lis Pendens, Sec. 48.23(1)(a), F.S.
a.	Prior to August 4, 1967, liens and other interests arising prior to the filing of the lis pendens but recorded after its filing were not eliminated.
b.	Prior to October 1, 1985, interests other than liens were not eliminated if arising prior to, but filed after, the recording of the lis pendens.
c.	After October 1, 1985, all unrecorded interests and liens other than interest of persons in possession or easements in use are eliminated unless the holder of the interest intervenes 20 days from commencement of suit.
3.	If personal property to be foreclosed,
	1. conduct UCC search and update before foreclosure sale;
	2. intangible tax search.
4.	Liquidate attorney's fees?
5.	Prepare Motion for Order to Show Cause, Order to Show Cause, Proposed Final Judgment and Notice of Sale.
6.	Civil Cover Sheet
7.	Filing and service fee check requests.
8.	Coordinate execution of verified complaint; coordinate attendance at ex-parte hearing to obtain entry of Order to Show Cause.
9.	Determine military status of individual plaintiffs. Check: https://www.dmdc.osd.mil/scra/owa/scra.home .
10.	Process under Ch. 48, F.S.
a.	Summons

b.	Return of service. NOTE: If service was required on the United States or the State of Florida, an affidavit of compliance should be in the court file with attached return receipt or other evidence of compliance with 28 U.S.C., Sec. 2410(b) or Sec. 48.121, F.S.
c.	Return day
i.	Usually 20 days, Rule 1.140(a), F.R.C.P.
ii.	United States has 60 days to answer, 28 U.S.C., Sec. 2410(b).
iii.	State of Florida has 40 days to answer, Sec. 48.121, F.S.
d.	Out of state mortgagors, other than foreign mortgagors, with known residence must be personally served under Sec. 48.194, F.S. The Fund relies on Sec. 48.194, F.S., effective October 1, 1993, which permits service by registered mail.
e.	As to out of state junior lienors service is by publication. The Fund relies on Sec. 48.194, F.S., effective October 1, 1993, which permits service by registered mail and Sec. 48.193, F.S., which makes the holding of a mortgage sufficient minimum contacts for purposes of jurisdiction over the lienors.
f.	Corporate search(es) to obtain registered agent information.
11.	Process under Ch. 49, F.S.
a.	Affidavit of diligent search under Secs. 49.041, .051 and .061, F.S. NOTE: If unknown residence, require procedure for unknown parties under Sec. 49.071, F.S.
b.	Notice of action under Sec. 49.08. F.S.
i.	If unknown parties/residence, follow statutory wording.
ii.	Parties must be properly named.
iii.	Must have proper legal description.

c.	Proof of publication showing publication once a week for two weeks under Sec. 49.10, F.S., must be filed, effective October 1, 1993.
d.	Date of mailing to known residence is to be noted on the court docket, Sec. 49.12, F.S.
e.	Return day is not less than 30 days after first publication, effective October 1, 1993.
12.	There are unknown parties or unknown residences of known parties, then must appoint a guardian ad litem (for incompetents), an administrator ad litem (for decedents) and an attorney ad litem (for those in military services). These appointees can be one person.
13.	Order title update to reflect lis pendens filing.
14.	Review answers, affirmative defenses, counterclaims. (Diary response dates)
15.	If successful at Order to Show Cause Hearing:
	1. coordinate publication of Notice of Sale;
	2. diary foreclosure sale date.
16.	If not successful at Order to Show Cause:
	1. prepare Motion for Summary Judgment;
	2. Affidavit in Support (include affidavit of defendants);
	3. Affidavit of Costs;
	4. Affidavit of Attorney's Time;
	5. Affidavits of Attorney's Fees (if not liquidated);
	6. Schedule hearing at least 25 days from filing motion.
	7. Notice for Trial.

17. Default all non-responsive parties.
18. If defaults entered:
1. Prepare Motion for Default Final Judgment in Foreclosure;
2. Non-Military Affidavits;
3. Affidavit of Amounts Due;
4. Affidavit of Attorney's Time;
5. Affidavit of Attorney's Fees (if not liquidated);
6. If no hearing necessary (no fees required or liquidated fees), send letter to judge requesting entry of final judgment with original note and mortgage, proposed Final Judgment and Notice of Sale. Be sure to send certified mail.
19. If case settles, check real property taxes and notify client of any tax information.
20. Final judgment
a. Parties properly named.
b. Contains proper legal description.
c. Orders the property sold no later than 35 days after the date of the judgment, unless the plaintiff or the plaintiff's attorney consents to later date. Sec. 45.031, F.S.
d. Finds plaintiff's lien superior to other interests named.
e. Finds that on filing Certificate of Title, defendant and all persons claiming under or against defendant are foreclosed.
f. Writ of Possession shall issue if defendants fail to remove possessions.
g. Clause regarding payment of registry fees.

h.	Social security number of debtor(s).
i.	Judgment creditors' address.
21.	Judicial sales procedure under Sec. 45.031, F.S.
a.	Notice of sale published once a week for two consecutive weeks and second publication must be at least five days before sale.
b.	Bidding instructions from client.
c.	Prepare certificate of sale, certificate of no disbursements and certificate of title.
d.	Attend sale.
e.	Documentary stamp payment.
	NOTE: The certificate under (c) must be in substantially the form set forth in Sec. 45.031, F.S.
22.	Redemption
a.	Periods
i.	45.0315 provides that a mortgagor or the holder of any subordinate interest may redeem a property from foreclosure by paying the amount specified in the judgment, order or decree of foreclosure or tendering the performance due under the security agreement, plus the reasonable expenses of foreclosure, at any time before the later of the filing of a Certificate of Sale by the clerk of the court or the time specified in the judgment, order or decree.
ii.	The United States under a tax lien has 120 days from the certificate of title to redeem. 28 U.S.C. Sec. 2410(c).
iii.	The United States under any other lien has one year from the certificate of title to redeem. 28 U.S.C. Sec. 2410(c).

b. On redemption, title reverts to status before institution of foreclosure.

23. Must await the end of the appeal period - 30 days from date of final judgment before foreclosure is final.

DEEDS IN LIEU OF FORECLOSURE IN FLORIDA

Deeds in lieu of foreclosure are available and often utilized in Florida. The deed transfers fee simple title to the property from the grantor to the grantee. Here are several things to keep in mind when considering the usage of a deed in lieu of foreclosure.

Merger of the mortgage into the deed

A deed in lieu of foreclosure may merge with the mortgage if that was the intent of the parties. *Fay v. Lougee*, 113 Fla. 784, 153 So. 91 (1934); *Lawton v. McIlvaine*, 113 Fla. 743, 152 So. 179 (1934); *Jackson v. Relf*, 26 Fla. 465, 8 So. 184 (1890); *Gourly v. Wollam*, 348 So. 2d 1218 (Fla. 4th DCA 1977); *Friedman v. Pohnl*, 143 So. 2d 690 (Fla. 3d DCA 1962). In *Sanderson v. Hudlett*, 832 So. 2d 845 (Fla. 4th DCA 2003), the court held that a covenant not to sue on a mortgage, given in connection with a transfer of real property, without a specific discharge of the mortgage, would NOT merge with the mortgage, and that the effect of the covenant was only to benefit the specified beneficiaries thereof, and not to release the mortgage.

If the deed in lieu expresses the intent of the parties that the merger not occur, then it does not occur; and the mortgage remains in existence even after the deed in lieu has been delivered, accepted, and recorded.

If a deed in lieu has been given, and has not merged with the mortgage, the mortgage survives the delivery and acceptance of the deed in lieu. Under such circumstances, the mortgagee can still foreclose out any junior interests in the subject real property.

Florida's documentary stamp tax

The tax implications of accepting a deed in lieu of foreclosure need to be considered. Generally, the Florida Department of Revenue takes the position that the documentary stamp tax (the "doc stamps") on a deed in lieu of foreclosure are calculated based upon the amount of promissory note indebtedness being forgiven in exchange for the deed. The documentary stamp tax is currently assessed at the rate of \$0.70 per \$100.00, or any part thereof, of consideration.⁴ (Thus, the doc stamps on a \$100 transaction are \$0.70. The doc stamps on a \$101 transaction are \$1.40.)

Most Florida foreclosures end with the plaintiff being the successful bidder with a bid of \$100, and doc stamps of \$0.70. By contrast, the consideration for a deed in lieu of foreclosure, and the concomitant doc stamp liability, is considerably higher. For example, in foreclosing a mortgage on a piece of property worth \$10 million, the likely doc stamps at the foreclosure sale would be \$0.70, while the doc stamps on a deed in lieu would be \$70,000.00.

In addition, the grantor of the property can face substantial federal income tax liability in connection with the transfer of the property. If the fair market value of the property being transferred is less than the debt, and the debt is forgiven in connection with the transfer, the grantor realizes both disposition proceeds and discharge income in connection with the transfer. Disposition proceeds are calculated as the difference between the fair market value of the property on the date of the transfer and the grantor's basis in the property. Discharge income is calculated as the difference between the debt being forgiven and the fair market value of the

⁴ There is an extra fee assessed in Miami-Dade County.

property. Both disposition proceeds and discharge income are taxable to the grantor as ordinary income.⁵

Thus, in the situation where a grantor conveys a piece of property which has a fair market value substantially in excess of its basis, and is released from liability in an amount far greater than the fair market of the property, huge tax liability to the grantor can result.

FREQUENTLY ASKED QUESTIONS:

1) Logistically speaking, what happens to any surplus dollars from the sale: The chances of there being excess proceeds, or even any bidders other than plaintiff, is almost nil. (More on that below.) If there are excess proceeds, the Clerk of Court holds them pending a court-ordered disbursement of them. In general, they go first to any junior lienholders, and then to the owner. They would NEVER go to plaintiff because in order for excess proceeds to exist, someone would by definition have to bid more than the full judgment amount plus 6% interest from the date of the judgment. Plaintiff is entitled to receive any proceeds up to the full amount of its judgment plus interest. (The interest rate changes from year to year in Florida, and is currently set at 6% for calendar year 2010.)

2) Logistically speaking, who will actually conduct the sale: Most foreclosure sales in Florida are conducted pursuant to Section 45.031, Florida's judicial sale statute. Under that statute, which is almost universally used, the Clerk of Court for the County in which the real property is located conducts the sale as a public auction at the County Courthouse. A Court, if asked, has the discretion to authorize the use of some alternative method of sale. Most plaintiffs use the procedure under Section 45.031 because it contains an automatic confirmation provision, and because Florida's title companies are familiar and comfortable with it. I have utilized other sale procedures in the past and can talk about them if you wish.

3) How do we collect money from third parties in the event a third party purchases the property: Under the Section 45.031 judicial sale procedure, the winning bidder must deposit 5% of the winning bid with the Clerk immediately upon the close

⁵ Recent amendments to the federal tax laws have afforded relief from these provisions to residential homeowners conveying deeds in lieu of foreclosure to lenders.

of the bidding. (The foreclosure sales in most Florida counties are held at 11:00 a.m.) The remainder of the winning bid must be paid by a deadline specified and determined by each local Clerk's office. The deadline in most counties is the afternoon of the sale at various times between 2:00 p.m. and 5:00 p.m. The Final Judgment can provide for a different payment deadline, but almost never does. The Clerk collects the money and holds it in escrow while the objection period under Section 45.031 runs. The Clerk charges a registry fee on the funds held. Once that objection deadline has run, the Clerk disburses the money pursuant to the provisions of the Final Judgment. The Final Judgment usually expressly provides that the Clerk shall disburse any sale proceeds first to reimburse plaintiff's costs, then for Florida documentary stamp taxes, then for plaintiff's attorneys' fees, and finally for the total sum due plaintiff under the final judgment, together with post-judgment interest. If there is any money still remaining, the Clerk disburses it pursuant to Court order.

If someone doesn't pay the 5% deposit upon the close of the bidding, the Clerk usually simply reopens the bidding and does the sale all over again. If the winning bidder doesn't pay the remaining 95% by the afternoon deadline, the 5% deposit is forfeited to the plaintiff and the Clerk readvertises and resells the property unless the Final Judgment has some other instructions.

We usually prevail on the Judge to include in the Final Judgment specific language directing the Clerk as to what happens if there is a bid payment default. For example, we often include language which directs the Clerk that if the winning bidder doesn't pay by the Clerk's deadline, the property goes automatically to the next highest bidder paying their full bid amount by the close of business on the day of the sale.

4) What if plaintiff purchases the property? Does plaintiff actually have to pay money into the court? Bid is debt amount/bid is surplus/bid is deficit: Florida is a judicial foreclosure state. The rules are markedly different from those in a non-judicial state. The plaintiff is entitled to bid on credit up to the full judgment amount, plus post-judgment interest to the date of the foreclosure sale. (The foreclosure sale is usually scheduled about 30 days after the date of the judgment.) As long as plaintiff's bid does not exceed the full judgment amount plus the post-judgment interest to the date of the sale, plaintiff does not have to pay money into the Court. However, if plaintiff were to bid more than the full judgment amount with interest, it would be subject to the same "5% and the rest by 5:00 p.m." rule that everyone else is.

Because everyone other than plaintiff will have to pay real money for their bid amount (5% at the close of the bidding and the rest by the afternoon deadline), it is extremely likely that plaintiff will be the only bidder at the sale,

and that plaintiff's winning bid will be \$100. Plaintiff's bid will likely be \$100 because, in Florida, the amount of the bid generally has nothing to do with the right to collect a deficiency and the amount of that deficiency, and because the State imposes a documentary stamp tax of \$0.70 per \$100 or any portion thereof, bid.⁶ (So the doc stamps on a bid of \$100 are \$0.70 and the doc stamps on a bid of \$101 are \$1.40.) Thus, since there is usually no one with the liquidity to bid on property and pay cash by the Clerk's deadline, and because the plaintiff bidding on credit under the judgment doesn't want to incur excessive doc stamp liability, most large commercial foreclosures in Florida end with the plaintiff as the winning bidder with a bid of \$100.

I mentioned above that in Florida, the amount of the bid generally has nothing to do with the right to collect a deficiency and the amount of that deficiency. That's because in Florida, the deficiency amount is generally determined by taking the full judgment amount as of the date of the foreclosure sale, with accrued post-judgment interest to the date of the foreclosure sale, and subtracting from that number the **greater** of (a) the fair market value of the real property on the date of the foreclosure sale, or (b) the bid amount. Thus, only if the plaintiff bids more than the fair market value of the property does the bid amount become relevant for deficiency purposes. Thus, if a plaintiff bids the full judgment amount, even if that amount is greater than the fair market value of the property, the plaintiff's right to a deficiency is extinguished entirely. If the plaintiff bids \$100, the deficiency is calculated by subtracting the fair market value on the date of the foreclosure sale from the full judgment amount with interest on that same date.

The deficiency amount, whatever it is, accrues interest at the post-judgment interest rate, currently 6% simple in calendar year 2010. The determination of the fair market value on the date of the foreclosure sale is an evidentiary matter, and is determined by the court at a deficiency hearing. The court typically considers appraisals and other expert witness testimony, and testimony of the former owner of the property. See further discussion of "fair market value" in paragraph 6 below.

5) In FL, is the foreclosure "all or nothing"? In other words, if our security interest is 5 lots and a third party only desires to purchase 3 lots, can we foreclose them separately?: Unless the court provides otherwise, all of the real property is sold as one unit. If asked, the court has the discretion to structure the foreclosure sale differently. For example, we have in the past prevailed on individual judges to order piecemeal sales, to allow the sales to be conducted by professional auctioneers, to allow successful bidders more time to pay their winning bids, etc.

⁶ There is an extra fee in Miami-Dade County.

6) In FL, if the bulk sale appraisal is less than the per-lot appraisal, which appraisal is the deficiency based on? Which amount would the court be inclined to accept?: This question has more meaning in a non-judicial foreclosure state. In Florida, the key determination for deficiency purposes is that of "fair market value." Fair market value is NOT a statutorily defined term. The court has great discretion in determining the amount. One case has held that for purposes of determining the right to a deficiency judgment, the "fair market value" of the property may be deemed to be that sum which, considering all circumstances, would be arrived at by fair negotiations between owner willing to sell and purchaser willing to buy, neither being under any pressure. *Flagship Bank of Orlando v. Bryan*, 384 So. 2d 1323 (Fla. 5th DCA 1980). This is usually the sort of analysis the court engages in to determine fair market value.

7) How do we determine how much to bid at the foreclosure sale?: For the reasons stated above, I suspect that in Florida, we'll want to start with a bid of \$100 and go up in small increments thereafter, with our maximum bid being the lesser of (a) what we believe to be the fair market value of the property, and (b) the full judgment amount plus post-judgment interest to the date of the foreclosure sale.

8) What are the logistics of a Florida foreclosure sale? I have addressed this to some extent already above. Unless the court orders an alternative sale procedure, which it absolutely won't unless we request it to do so, the sale will be conducted at the County Courthouse by the Clerk of the Court. The sale is advertised in a local newspaper once a week for two consecutive weeks, with the last advertisement coming at least five (5) days before the scheduled sale. The sale is usually held at 11:00 a.m. and is a public auction at which anyone may bid. The winning bidder must deposit 5% of the bid at the close of the bidding, and pay the rest by the Clerk's afternoon deadline. (If the plaintiff is the winning bidder, there is no actual money payment to the Clerk unless the amount bid exceeds the full judgment amount with accrued post-judgment interest.) Shortly after the conclusion of the sale, sometimes as soon as that very morning, or early that afternoon, the Clerk issues a Certificate of Sale, which reflects the identity of the successful bidder at the sale. Per Section 45.0315, the issuance of the Certificate of Sale eliminates all rights of redemption, unless the Court has specified a different redemption deadline. The Clerk issues the Certificate of Title, which is effectively the deed to the property, on or about the 11th day after the sale if there are no objections to the sale pending. If any objections are filed in the ten (10) days after the filing of the Certificate of Sale, the Court hears them promptly and the

Certificate of Title does not issue until they are disposed of. If an objection is granted, the sale is readvertised and reheld. If an objection is denied, the Clerk issues the Certificate of Title on or about the 11th day after the sale, or immediately upon the denial of the objection, whichever is later. Objections to sales are very rare, and even more rarely granted.

9) Should we provide you with bid sheets, which reflect the minimum and maximum bids on the property?: We customarily ask the client for bidding instructions for the sale. We usually want to know the minimum bid, which is usually \$100, the maximum, which is usually the lesser of (a) the client's estimate of the fair market value and (b) the full judgment amount with accrued post-judgment interest to the sale date, and the bid increments. We usually want to bid in relatively small increments because the higher the bid, the higher the doc stamp tax.

If you have any question or comments, please do not hesitate to call me.